APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17,860

MID-SOUTH DISTRIBUTORS, ET AL. and COTTON STATES, INC., ET AL., *Petitioners*,

versus

FEDERAL TRADE COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Trade Commission

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(February 23, 1961.)

Before JONES and BROWN, Circuit Judges, and CARSWELL, District Judge.

BROWN, Circuit Judge: We do not overwork a faithful figure to say that this is the other side of the coin. For here it really is. In a series of cases appealed from adverse decisions of the Federal Trade Commission, four Courts of Appeals have now held in seven cases[1] that

[1] Standard Motor Products v. FTC, 2 Cir., 1959, 265 F. 2d 674, cert. denied, 361 U.S. 826, 80 S. Ct. 73, 4 L. Ed. 2d 69; P. Sorensen Mfg. Co. v. FTC, D.C. Cir., 1957, 246 F. 2d 687; P & D Mfg. Co.

manufacture-sellers violated § 2(a) of the Robinson-Patman Act by selling automotive parts at discriminatory prices through volume rebates extended either directly to individual buyers or to them through buyer-groups. Here, as did the Second Circuit in its recent case[2] we deal with FTC's cease and desist order against *buyers* for having *bought* at discriminatory prices contrary to § 2(f).[3]

The petitioners are two cooperative buyer groups, Mid-South Distributors and Cotton States, Inc., and the 23 jobbers who are members of Mid-South and Cotton States. The member companies are engaged as jobbers in the sale and distribution of automotive parts through many of the southern states. The prices at which they sell to their customers are not in question here. What, and all that is involved, is the price at which the manufacturer-supplier sells to them. There are thus three categories immediately involved, the thumbnail descriptives of which reflect the respective functions of each: (1) the Co-ops, (2) the Member-Jobbers, and (3) the Suppliers. All of the three have immediate connection with the sales and prices in controversy here. In addition to these three there is another element of this economic community—the competitors of Member-Jobbers.

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v. FTC, 7 Cir., 1957, 245 F. 2d 281 cert. denied, 355 U.S. 884, 78 S. Ct. 15, 2 L. Ed. 2d 114; C. E. Niehoff & Co. v. FTC, 7 Cir., 1957, 241 F. 2d 37, modified Moog Industries v. FTC, 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370; Moog Industries v. FTC, 8 Cir., 1956, 238 F. 2d 43, affirmed 1958, 355 U.S. 411, 78 S. Ct. 377, 2 L. Ed. 2d 370; E. Edelmann & Co. v. FTC, 7 Cir., 1956, 239 F. 2d 152, cert. denied, 355 U.S. 941, 78 S. Ct. 426, 2 L. Ed. 2d 422; Whitaker Cable Corp. v. FTC, 7 Cir., 1956, 239 F. 2d 253, cert. denied, 353 U.S. 938, 77 S. Ct. 813, 1 L. Ed. 2d 761.

[2] American Motor Specialties Co. v. FTC, 2 Cir., 1960, 278 F. 2d 225.

[3] "(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 USCA § 13(f).

These in turn are made up of concerns which may be divided roughly into two groups. In one group will be (a) the large chain stores, the nationally integrated oil company and tire company outlets, and authorized dealers of the huge automotive manufacturers. The other group will comprise (b) other independent individual jobbers who are neither within (a) nor a member of a Co-op buying group. In the main we think it is petitioners' unwillingness, or at least failure, to take cognizance of group (b) that underlies nearly all of their objections to the FTC order under review.

Nothing is left to the imagination as to the origin of the Co-ops or the reasons for it. Petitioners' brief frankly states that they "* * * formed the cooperative associations * * * for the purpose of achieving a measure of competitive parity with their larger, more aggressive rivals * * *," meaning those in group (a). It was, they assert, this "enormous bargaining leverage of these integrated distributive organizations [group (a)] * * *" and purchases by independent jobbers "inevitably at higher prices * * *" which foreclosed "their traditional competitive position in the automotive parts after-markets." Later on they declare "Petitioners are neither judges, antitrust lawyers, nor soothsayers; they are simply local businessmen operating in a fiercely competitive industry dominated by far larger integrated competitors [group (a)] Petitioners joined in these cooperatives for the sole purpose of achieving some measure of competitive parity with these rivals. * * *."

Not a word is said about what happens to those in group (b) who, if the program of the Co-ops and the Member-Jobbers is successful, will feel the pinch not only of the huge competitors in group (a) but that of the Member-Jobbers as well.

The system inaugurated and followed is a very simple one. It came into being because of the traditional

pricing plan in the automotive parts business. Suppliers had basic list prices. Specified successively greater percentage reductions off the list price were offered to jobbers for specified increases in dollar volume of purchases.[4] These cumulative volume rebates and graduated price schedules were accorded all purchasers and were available generally throughout the industry. To achieve these graduated dollar volume levels, the purchases for Member-Jobbers were made by the Co-op. The volume discounts were computed on the basis of the total purchases for all Member-Jobbers through the Co-op. After deducting the small operating expenses of the Co-op, these volume rebates were distributed internally to Member-Jobbers as patronage dividends proportionate to each Member-Jobber's purchases for the year. The effect of this was to give Member-Jobbers a substantially lower cost than would have been paid for the same kind and quantity of goods by such jobber individually or by an independent jobber—those in group (b).

The Commission determined that these volume discounts through the guise of purchases by the Co-ops were an unlawful discrimination in price likely to lessen competition or cause injury to the less favored competitors of the Member-Jobbers—those in group (b). The Commission further held that these activities of Member-Jobbers as well as the Co-ops constituted "knowingly to induce or receive a discrimination in price which is prohibited" by the Act. § 2(f), note 3, supra. Cease and desist orders were entered against all.

The petitioners assert two principal complaints by this appeal. First, the operative effect of the order is to

[4] The seller cases, note 1 supra, related primarily to this basic volume rebate system, rather than the use of such a system in sales through the guise of buyer cooperative groups. Of course, this traditional volume rebate plan was not finally condemned until 1954-1956.

prohibit distribution of net earnings by a cooperative contrary to the freedom to do so explicitly recognized by § 4 of the very same Act.[5] Second, the evidence was insufficient to establish a violation of § 2(f). This latter breaks off into about three subdivisions.[6] The only substantial one is the contention that the Commission failed to meet its burden of proving the petitioners knew that the Suppliers could not justify such preferential prices as either a § 2(a) lower-cost or a § 2(b) meeting-of-competition.

Neither the status as a cooperative nor § 4, note 5, *supra*, affords the insulation here asserted. The order of the FTC does not undertake to prohibit distribution of earnings. The order, on the contrary, strikes at the jugular—the transactions which beget the so-called earnings. The petitioners virtually concede—and in conceding give up nothing in view of *Maryland and Virginia Milk Producers Association, Inc.* v. *United States*, 1960, 362 U.S. 458, 80 S. Ct. 847, 4 L. Ed. 2d 880, as well as others—that § 4 gives no immunity to the Co-op as an entity. It must, as would any other organization of comparable

[5] "Nothing in this Title shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association." 15 USCA § 13b.

[6] These contentions briefly are:

1. There is no evidence that Member-Jobbers are "engaged in commerce."

2. There is no evidence that Member-Jobbers or the Co-ops received any "discrimination in price."

3. There is no evidence that they "knowingly" induced or received prohibited price discrimination as petitioners did not have "knowledge" that the lower prices they paid (a) would have an adverse effect on competition, (b) were not justified by savings in sellers' costs or (c) were not offered by the selling suppliers to meet competition.

size, respect the prohibitions against discriminatory price differentials.

But petitioners insist that since the FTC order does not purport to find any discrimination in the price charged by Suppliers as between these Co-ops and other buyer groups or entities for like purchases, the effect of this order is to infringe upon the *internal* operation of a cooperative. So long, the argument continues, as the cooperative as an entity refrains from actions violative of the anti-trust statutes, it may be used freely for purchases for the benefit of the Member-Jobbers with the unrestricted right to return to them "the net earnings * * * resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."

The § 4 exemption has no such purpose. It recognizes cooperatives as valid organizations. But it does not turn the entity loose to acquire on behalf of its members, through the guise of group purchasing, price differentials or other preferences to which each would not otherwise be entitled. *American Motor Specialities Co., Inc.* v. *FTC* 2 Cir., 1960, 278 F. 2d 225, 229; *Quality Bakers of America* v. *FTC*, 1 Cir., 1940, 114 F. 2d 393, 400; cf Maryland and Virginia Milk Producers Assn. v. United States, *supra*. We purposely leave to a future day the problem of delineating the activities which may rightfully come within the congressional purpose of leaving cooperatives "free to seek through co-operative endeavor the economies and savings of mass operations * * * " and assure to them "any real economies and savings to which mass operations entitle them * * *."[7]

[7] Congressman Utterback, chairman of the House Conferees, 80 Cong. Rec. 9415-19 (June 15, 1936). We are reminded quite recently that, despite his prominence in the handling of this statute in the legislative process, the congressional purpose is to be determined by the legislation as enacted and not necessarily the statements made by Congressman Utterback. FTC v. Anheuser-Busch, 1960, 363 U.S. 536, 553, 80 S. Ct. 1267, 4 L. Ed. 2d 1385.

We may put aside quickly the contention that there was inadequate proof either of interstate purchases or knowledge that the price differential constituted discriminatory injury or damage to competitors of the Members-Jobbers.

The first rests upon a total misconception of the transaction involved in this proceeding and under the Act. As to buyers, what the statute covers and forbids is the receipt of a discriminatory price differential in the *purchase* of goods from suppliers. It does not involve the resale of such goods by that buyer. Consequently the many cases[8] arising under the Fair Labor Standards Act, 29 USCA §§ 201-19, testing resales after receipt of the goods in interstate commerce are of utterly no relevance. Here it was overwhelmingly established that most, if not all, of the questioned purchases by the Member-Jobbers through the Co-ops moved directly in interstate commerce.

The second contention—inadequacy of the evidence to establish an injurious discriminatory price or knowledge thereof—apart from the problem of the burden of proof which we discuss subsequently—is merely the reiteration of a contention now rejected in every one of the seller cases, note 1, *supra* Whether a price differential has the reasonable likel ıood of injury to competitors is the identical question whether the inquiry concerns those who sell or those who buy at such prices. A simple, but awesome, economic fact was overwhelmingly proved—a Member-Jobber obtained substantially

[8] Mitchell v. Livingston & Thebaut Oil Co., 5 Cir., 1958, 256 F. 2d 757; Mitchell, Secretary v. C & P Shoe Corp., 5 Cir., 1960, ... F. 2d .... [No. 18352, Dec. 23, 1960]; Allesandro v. C. F. Smith Co., 6 Cir., 1943, 136 F. 2d 75; Spencer v. Sun Oil Co., D.C. D. Conn., 1950, 94 F. Supp. 408; Brenner v. Texas Company, N.D. Cal., 1956, 140 F. Supp. 240, 243; Dial v. Hi Lewis Oil Co., W.D. Mo., 1951, 99 F. Supp. 118; Roland Electric Co. v. Walling, 1946, 326 U.S. 657, 666-667, 66 S. Ct. 413, 90 L. Ed. 383.

the same type and quantity of goods at a price substantially lower than his group (b) independent competitors. That hurt. That hurt the less favored purchasers. It was that injury which Congress sought to prohibit. *FTC* v. *Simplicity Pattern Co.*, 1959, 360 U.S. 55, 62-64, 79 S. Ct. 1005, 3 L. Ed. 2d 1079; cf. *FTC* v. *Anheuser-Busch, Inc.*, 1960, 363 U.S. 536, 80 S. Ct. 1267, 4 L. Ed. 2d 1385. All persons—sellers or purchasers, corporate or animate—must now know, constructively or actually, that price discriminations which injure are prohibited. It is no defense either to sellers or buyers that either was ignorant of that much of the law's requirement. The differences in price, of course, may perhaps be justified by the seller to overcome the law's characterization of the difference as a prohibited discrimination. When that happens obviously no violation occurs. But that is because of justification, not the absence of economic injury. So far as the specific element of discriminatory injury is concerned, the Government's § 2(f) burden of proof is satisfied by showing price differentials of a kind which would cause or likely cause injury to competitors. Cf. *FTC* v. *Simplicity Pattern Co.*, *supra*, 360 U.S. 55 at 64. This phase is not bound up with the buyers' *knowledge* that the seller would be unable to justify the differential. Cf. *FTC* v. *Anheuser-Busch*, *supra*.

This is, of course, in sharp contrast to the §§ 2(a) and 2(b) lower-cost or meeting-of-competition defenses of the seller.[9] As to these, in a § 2(f) proceeding it is a

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[9] Lower-cost defense is found in § 2(a), 15 USCA § 13(a). This section forbids discrimination "in price between different purchasers of commodities of like grade and quality." Quantity, as such, was no longer to be an automatic basis for price differential. Under the Robinson-Patman Amendments that was to be handled by the proviso that nothing in the Act "shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *." As to this the seller has the burden under § 2(b).

The meeting-competition defense is found in the proviso of § 2(b)

part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the price differential under either one or both. *Automatic Canteen* v. *FTC*, 1953, 346 U.S. 61, 73 S. Ct. 1017, 97 L. Ed. 1454.

Under that case it is not sufficient merely to show the receipt of a price differential which likely would injure. For the buyer "knowingly to induce or receive" a price "prohibited by this" Act, it is essential that the Commission go further and establish that the buyer had reason to know that the seller could not meet either defense. The decision hardly meant, however, to impose any rigid mechanical requirements. On the contrary, the Court's opinion reflects an awareness that this critical knowledge of the buyer as to both (a) the underlying facts constituting the asserted justification and (b) the conclusion that it would not legally constitute a justification may have to be established from indirect circumstantial inferences. Rarely will buyers have committed the crudities to permit categorical and direct proof. Of course, this is not to let down the bars. The imponderable, elusive nature of "costs" which led the Court to impose the laboring oar on the Commission rather than on the buyer makes it necessary that like protection—if not more so—be afforded the buyer where the attack is circumstantial. But within those limits much is available from which safely to draw reliable inferences.

With its 1306 printed pages and hundreds of detailed, tabulated exhibits, we could not begin to detail the evidence of this record. The sum of it, briefly compressed, is quite sufficient to show the basis for inferences

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that nothing in the Act "shall prevent a seller rebutting the prima-facia case * * * by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor * * *."

of buyer knowledge of seller non-justification.[10] The outstanding factor is that as to a specific purchase order the particular Member-Jobber knew two things. First, the price he was obtaining through the Co-op was substantially lower than his group (b) competitors were required to pay.[11] Second, for all practical purposes, the order and shipment were handled exactly the same. It is true that the Member-Jobber forwarded the order to the Supplier on a Co-op order form which ostensibly reflected a purchase of the goods for the Co-op. But this order form showed that shipment was to be made to the specified Member-Jobber. The buyer knew that this procedure represented no real savings in cost to the seller. Invoices were, of course, sent by the Supplier to the Co-op which was presumably liable therefor. But the Member-Jobber as buyer knew that the volume discount was extended, not because of increased credit reliability acquired by the presence of the Co-op as a sort of guarantor, but solely because of the increased volume of total purchases. The buyer could not reasonably have entertained any idea that he was getting preferred treatment over his competitor because credit costs were less. Moreover, there was no proof that this is why Suppliers were selling at more favorable terms.

Of course, all of this occurred in the setting which the Trial Examiner aptly characterized as "the facts of life" of the automotive parts business. The simple truth was that these volume discount rebates were offered indiscriminately to jobbers as an industry-wide competitive practice. They were extended by Suppliers to

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[10] In the seller cases, note 1, supra, the principal defense has been the contention that there was no injurious discrimination. The § 2(a) lower-cost defense has been raised in some but has been consistently overruled. See Standard Motor Products v. FTC, 265 F. 2d at 676; C. E. Niehoff & Co. v. FTC, 241 F. 2d at 41.

[11] This is implicit in the structure of the volume rebate pricing system.

induce greater purchases and not because the narrow price differential in each minutely graduated price tier represented any real difference or savings in costs.[12] Everyone was doing it. Indeed, that is why these Co-ops came into being—their Member-Jobbers wanted to get in on the act.[13] The presentation to Suppliers by the Co-ops in seeking a discount arrangement was primarily one emphasizing volume only. The effort was not to convince a prospective Supplier that through the group purchases of the Co-op, economies would be effected. What was sought, and all that was sought, was parity with others who bought a like quantity. This was quite without regard to whether there were or were not savings.

In addition to these circumstances, the record actually contains positive evidence that at least three of the

[12] This is illustrated by one of the principal Suppliers volume rebate schedules on an annual retroactive basis:

Net purchases during each fiscal year	Retroactive Rebate (percent)
Under $1,000	None
$ 1,000 to $ 4,999	5%
$ 5,000 to $ 7,499	7½
$ 7,500 to $ 9,999	9
$10,000 to $12,499	10
$12,500 to $14,999	12
$15,000 to $17,499	14
$17,500 to $19,999	15
$20,000 to $22,499	16
$22,500 to $24,999	17
$25,000 to $27,499	18
$27,500 and over	19

[13] For example, in purchases from the same Supplier under its schedule, note 12, supra, a Member-Jobber's purchases totaling less than $1,000 and therefore subject to no volume discount nevertheless received at 19% discount through aggregation of all Member-Jobbers' purchases that year. Other Member-Jobbers with purchases warranting 5% discount likewise received 19% rebate, or an advantage of 14%. Out of a total of $33,482.88 group purchases through the Co-op, the Member-Jobbers received volume rebates which exceeded by $4,478.06 the amount that would have been received by the individual purchasers.

major Suppliers acknowledged they could not justify the price reductions on the basis of lower costs. Of course, under *Automatic Canteen* this would not automatically convict a buyer. Quite possibly a buyer in good faith could think that the seller was able to justify the cost differential even though that seller knew it could not. But it goes a long way. If the Supplier-sellers knew this—even though they were late facing up to the fact[14]—it is not unreasonable for the trier to conclude that no one in that business should seriously have entertained any notion to the contrary.[15]

Nor was a different conclusion compelled by testimony that on inquiry by Co-op representatives each of a great number of Suppliers assured the Co-op that it could justify the cost differential. As a technical matter, the testimony was a vague sort as to times places and persons. More than that, repeated parrot-like for a succession of companies indiscriminately including many who extended no volume discounts and from whom individual jobbers could buy cheaper than through the Co-ops, it amounted to nothing more than an assurance that the Suppliers would give the Member-Jobbers the dollar volume rebate benefits for the group buying of their individual needs.

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[14] Representatives of several Suppliers in testifying in this proceeding acknowledged that in seller case proceedings, see note 1, supra, accountant witnesses on behalf of such sellers acknowledged that the price differentials could not be cost-justified.

[15] Among other "facts of life" which gave meaning to all of these circumstances was the nature of the immediate activities in the operation of each of the Co-ops. In Cotton States, these were handled by an owner of one of the Member-Jobbers right along with his regular jobber activities. Mid-South had one employee doing essentially bookkeeping accounting work. There was no Co-op inventory, warehousing or distribution. There were undoubtedly annual or periodic meetings of the members affording certain prospective suppliers an opportunity to show their line. But the industry-wide practice of volume rebates rested on dollar volume of purchases only without regard to whether it was more, or less, convenient or inexpensive to such supplier.

Even less need be said of the § 2(b) seller justification to meet competition.[16] The Co-ops were not formed to give Suppliers an opportunity to meet competition with other Suppliers. The Co-ops were formed to get from Suppliers who were already committed to the volume rebate practices the benefit of that competitive method for individual jobbers through the pooling of orders. What was sought was not a benefit *for* one Supplier because individual jobbers could get a like advantage from another Supplier. What was sought was a benefit which the individual jobbers at their volume level could get from no one. The Co-ops, in an effort to show a lower-cost seller justification for the differential, stressed the value of sales service rendered by the Co-ops to Suppliers. In other words, it was almost invariably the case of the Co-ops seeking out the Supplier to obtain from a Supplier a volume discount contract. A buyer earnestly negotiating with a Supplier to obtain from such Supplier the benefit of that Supplier's volume discount tables already in effect can certainly not urge that he was entitled to assume that the Supplier was extending such price differentials as a means of meeting competition with other Suppliers. And yet, once we get out of the awkward double negatives[17] of the *Automatic Canteen* rule that is in effect what petitioners assert here.

[16] In none of the seller cases, note 1, supra, has this been successfully maintained. It appears to have been urged only in these: Standard Motor Products v. FTC, 265 F. 2d at 677; C. E. Niehoff Co. v. FTC, 241 F. 2d at 41; E. Edelmann & Co. v. FTC, 239 F. 2d at 156.

[17] "We therefore conclude that a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or *not* known by him *not* to be within one of those defenses." 346 U.S. 61 at 74.

This was followed shortly by this statement. "Assuming, as we have found, that there is no substantive violation if the buyer did *not* know that the prices it induced or received were *not* cost-justified, we must in this case determine whether proof that the buyer knew that the price was lower is sufficient to shift the burden of introducing evidence to the buyer." 346 U.S. 61 at 74. (Emphasis supplied.)

The Commission therefore adequately sustained its burden of going forward with the evidence. And on the total evidence the Commission, applying correct legal standards, determined as finder of the fact that these volume rebates through the guise of Co-op purchases constituted price discrimination prohibited by the Act, that is, not within seller justification. There it ends.

If this is to entrench further the large chain-store automobile-gasoline-dealer competitors and aggravate, not lessen, the competitive disadvantage which these Member-Jobbers must bear, the result, if bad economics or bad social policy, is for Congress to change. Until that is done, one caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one. When David slays Goliath no one else may be hurt. That is what the Commission determined was the result here. The Act, on these facts, empowered it to order it stopped.

AFFIRMED.

JONES, Circuit Judge, concurs in the result.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1960

No. 17,860

MID-SOUTH DISTRIBUTORS, ET AL. and COTTON STATES, INC., ET AL., *Petitioners*,

versus

FEDERAL TRADE COMMISSION, *Respondent*.

Petition for Review of an Order of the Federal Trade Commission.

Before Jones and Brown, Circuit Judges, and Carswell, District Judge.

Judgment

This cause came on to be heard on the petition of Mid-South Distributors, and others, and Cotton States, Inc., and others, for review of an order of the Federal Trade Commission issued on January 24, 1959, in Docket Nos. 5766 and 5767, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the order of the Commission in this cause be, and the same is hereby, affirmed.

February 23, 1961

Issued: Apr 3 1961

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:
John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

In the Matter of

Docket No. 5767

D & N Auto Parts Company, Inc., a corporation, et al.

and

Docket No. 5766

Borden-Aicklen Auto Supply Co., Inc., a corporation, et al.

Opinion of the Commission

By Kern, Commissioner:

The complaints in these cases charge the respondents, respectively named therein, with violating Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act.[1] The respondents (except for certain individual respondents against whom the complaints were dismissed) have appealed from the initial decision of the hearing examiner covering both cases which holds that they have violated Section 2(f) and which contains an order to cease and desist the practices found to be unlawful.

These are "group buying" cases. The respondents in each include jobbers for automotive parts, accessories and supplies and a membership corporation. In Docket

[1] These cases have been tried concurrently and under an agreement of all the parties the two have been considered as one case.

No. 5766, the membership corporation is Mid-South Distributors, Memphis, Tennessee; in Docket No. 5767, Cotton States, Incorporated, Andalusia, Alabama. These corporate groups were organized and have been maintained for the apparent purpose of inducing and receiving lower prices on automotive products than would otherwise be obtainable by most of the member jobbers acting individually. Automotive suppliers such as Standard Motor Products, Inc., and Moog Industries, Inc., and others, sold their lines of products to the respondent jobbers and granted them volume rebates based on the aggregate purchases of all the group members. In many, if not in all instances, the volume rebates were made pursuant to a system or plan which involved a sliding scale of discounts based upon the volume purchased in the preceding year.

The main issue on this appeal, it appears, is whether counsel in support of the complaint has met the burden of proof required by Section 2(f) as interpreted by the Supreme Court of the United States in *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61 (1953). The subsection reads as follows:

> "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

There is no question that respondent jobbers have been granted lower prices than some of their jobber competitors on goods of like grade and quality. This results from the discounts ranging up to 20% given by the various suppliers based on the aggregate purchases of all members of each group. The record shows that various competing jobbers did not purchase individually in sufficient volume to receive comparable discounts. There is likewise evidence of keen competition, small profit margins and other factors sufficient to justify a conclusion that the discounts may

result in substantial injury to competition. It is also clear that respondents knew all such factors.

The *Automatic Canteen* case, *supra*, holds, however, that in order to establish a violation of Section 2(f), the Commission as a part of its case must show more than that the buyer knew of the price differentials and of their probable competitive effect. In other words, under the "balance of convenience" rule applied by the court, the burden is on counsel in support of the complaint to come forward originally with evidence that the buyer is not a mere unsuspecting recipient of the prohibited discriminations. Such evidence, under the Court's opinion, must include a showing that the buyer, knowing full well that there was little likelihood of a cost justification defense available to the seller, nevertheless induced or received the discriminatory prices. Just what evidence is necessary to make this showing, as the court indicated, will, of necessity, vary with the circumstances of each case. That trade experience in a particular situation can afford a sufficient degree of knowledge, however, is clear.

In this case, the record clearly shows that the buying groups were mere bookkeeping devices. There was nothing in their manner of operation which could possibly save a seller any significant amounts. The method of purchase was substantially the same and deliveries were made in the same manner and in substantially the same quantities as if each jobber member had been operating individually rather than as a group member. About the only saving a seller could expect would result from the fact that only one billing need be made instead of several separate billings. *Cf. C. E. Nichoff & Co. v. Federal Trade Commission*, 241 F. 2d 37 (1957). It is reasonable to conclude that where price differences are as great as those here shown, ranging up to 20%, any savings such as that on billing costs could not possibly justify the price discriminations.

Respondents obviously had knowledge of this fact. They knew that the jobber members generally would not be entitled to the higher discounts based on their individual purchases. They knew, or should have known, in addition, in view of their purchasing in substantially the same volumes and receiving shipments in the same manner as other jobbers, that any differences in the method of purchasing could not give rise to sufficient savings in cost to justify the price differentials.

Moreover, the price differences shown herein have their source in a rebate system based, not on quantities or other factors involved in any particular sale, but, rather, upon the combined dollar amount of all sales to a group made in the preceding year. Under such a system the prices necessarily bear relation to factors other than actual costs of production, sale or delivery, and the inevitable result is systematic price discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (1956). Under such circumstances respondents are charged with the knowledge that the lower prices they received could not be cost justified.

If under the *Automatic Canteen* decision counsel in support of the complaint has the additional burden of producing evidence tending to show that respondent jobbers likewise knew or should have known that the "defenses" of fluctuating market conditions and bona fide attempts to meet lower competitive prices were not available to the sellers, the record is equally persuasive that this burden also has been met.

The last proviso of Section 2(a) exempts from the Act price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned. The substance of the proviso appears to be that a defense may be made out in occasional and temporary situations such as those set forth including imminent deterioration of perishable goods and

obsolescence of seasonable goods. In view of this, respondents would have no reason to believe that the volume rebates they received based on aggregate annual purchases and continued from year to year could possibly have any relation to the aforesaid proviso.

The respondents also knew, or should have known, that the various sellers could not have defended the price discriminations on the basis of the proviso contained in Section 2(b). The respondents knew that the defense of cost justification was unavailable to the sellers for the reasons stated in preceding paragraphs, and for the same reasons knew that such a defense would not be available to any competing sellers granting preferential prices on the same basis. Knowing, therefore, of the illegality of the pricing systems involved, the respondents knew that the sellers could not defend such prices on the basis of meeting in good faith the equally low prices of competitors for the reason that the prices so met would not be lawful prices.

In the *Automatic Canteen* case, the court in a note stated as follows:

> "Our view that § 2(b) permits consideration of conventional rules of fairness and convenience of course requires application of those rules to the particular evidence in question. Evidence, for example, that the seller's price was made to meet a competing seller's offer to a buyer charged under § 2(f) might be available to a buyer more readily even than to a seller." (346 U.S. 61, note, 23 at p. 79)

Therefore, while it has been shown sufficiently that respondents knew that the "defenses" of fluctuating market conditions and the meeting of lower competitive prices were not available to the sellers, it appears in the circumstances that counsel in support of the complaint does not have the burden of making such a showing. It seems to be quite clear that the court was referring to situations such as exist herein where the buyers would more readily

have such evidence and would have the burden of coming forward with it.

Respondents further contend on this appeal that Mid-South Distributors and Cotton States, Incorporated, are cooperative associations, and, therefore, not prohibited from returning to their members the net earnings or surplus resulting from their trading operations, in proportion to purchases of the members of the association, citing Section 4 of the Robinson-Patman Act (49 Stat. 1528). It is our opinion that the reasoning of the court in *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393, 399-400 (1940), on this point in a Section 2(c) matter is equally applicable to a Section 2(f) matter. In other words, Section 4 does not authorize cooperative associations to engage in practices forbidden by Section 2(f), nor except them from its provisions.

Respondents also argue that the respondent jobber companies should not be ordered to cease and desist in their individual capacities the practices held illegal and request that the paragraphs in the order to this effect be stricken. The contention is that these respondent companies are charged with violating Section 2(f), by acting through Cotton States, Incorporated, and Mid-South Distributors, and that it is unfair to issue an order against them relative to their activities as individuals. It is sufficiently clear, we believe, that these proceedings have included the respondent jobbers as individual concerns and that this type of order is necessary to bring an end to the unlawful practices. The Commission, of course, is not limited to prohibiting the illegal practice in the precise form in which it was found to have existed in the past. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondents' appeal is denied. Accordingly, the findings, conclusions and order contained in the initial decision are adopted as those of the Commission.

February 24, 1959

APPENDIX D

Representative Testimony With respect to Petitioners' Knowledge of Cost Justification

Witness Taylor:

Q. I first asked you, does Cotton States perform functions which are an aid to the manufacturer?

A. Yes.

Q. Will you name some of them?

A. Quite often the manufacturer approaches me as a head of the group in the interest of getting his line into the businesses of the individual members. We take the information on the line, the selling points of the line, quality of the merchandise, and all of that, and we take it up with our members by bulletins, by telephone calls, by personal conversations, and make presentations of the line in the meeting, produced samples, furnished by the manufacturers, so the members can all at one time see the line and discuss it pro and con as to the quality of the line and to the sales possibility of that line. We hand out catalog information, advertising material and sales promotion material. We guarantee that manufacturer in case we take the line, we guarantee the payment of all members. We bill it to one place. We assume the responsibility of the payment. The manufacturer only has to keep records on one account, and that is Cotton States, Incorporated. That cuts down on his bookkeeping expense. He has to handle one account instead of 17, 18, and we guarantee his money. We pay it. It cuts down on his credit loss and on his chance of credit loss. There are many other things we do in the way of promoting the sale of his line to our members.

Q. I believe you said, didn't you, that you allow top executives to come to meet with all of you at once, and, therefore, perform a function for him which keeps him from having to go around and see each one; I believe you said that?

A. Yes, but they don't all do that. We do it both ways. In other words, we give them an opportunity to come before us, and if they can't get there, sometimes we present the line. We do it both ways.[25]

Q. Do you perform a function of advertising for their benefit among yourselves?

A. Yes.

Q. What about obsolescence exchange?

A. We do. In other words, we swap our obsolescence off between each member.

Q. How does that benefit the manufacturer?

A. Well, quite often maybe an item won't sell in Squeedunk, Andalusia, or Alabama, or somewhere like that, or sell good on the Coast or it would sell good in North Carolina or it would sell in Birmingham. Maybe they would have an outlet for that. Well, we exchange lists on items that are slow-moving rather than first ask the manufacturer to help us with it. We try to help ourselves first and, therefore, relieve him of that responsibility and expense.

Q. Is that substantial, is that a substantial saving to the manufacturer?

* * *

A. I can't answer it as to the dollars and cents amount but the manufacturer thinks it is a substantial saving because it keeps him from having to put a man into each one of those places trying to peddle out that place, help a man get it out of there, the same service they give to all other accounts.

Q. In other words, where you don't do it for them among yourselves, they send a man from their factory to an individual and pay that man to go down there and do it and so you do it for him or take it up, one?

A. That is right.

Q. Do you warehouse anything?

A. Yes.

Q. And is that a savings to the manufacturer?

A. Yes. We warehouse for each other, in exchange. We give each other the privilege of picking up from each member, other than the fact that we carry some lines in our warehouse.

• • •

Q. Mr. Taylor, he asked you about Moog Industries. To go back to another line of questioning that we left for a moment, can you recall whether or not any authorized representative of Moog Industries has ever represented to Cotton States and its members at a meeting that the prices they sold you at were justified to them in savings in manufacturing and selling?

A. Oh, yes.

• • •

Q. All right. Let me ask y u about Niehoff. Was anything similar to that done by a representative of Niehoff at the meetings of Cotton States?

A. Yes.

Q. Who?

A. I believe that boy's name is Ray Rickett.

Q. He was authorized representative?

A. Yes.

Q. What in substance did he say?

A. Similar statement, that they needed more distribution in this territory and had been unable to get it; that they believe that through our promotion, concerted effort that we could give them what they were looking strictly for sales, and that instead of them running around all over the country and doing what was commonly done at that time, spending $35 to shake hands with a man, that they could come before us in one group and get the story over and get started in business.

Q. What about Whitaker? You mentioned them.

A. Yes.

Q. Will you tell what that was and who it was, if you recall?

A. It was a similar statement, but I don't remember the name of that representative at the moment.

Q. Was he an authorized representative?

A. Oh, yes.

Q. All right. What did he say in substance?

A. He said that they were one of the pioneers of the business, capable business and after market and that they were looking for business through wholesalers and that they felt like that we could do the job for them; that the thing they wanted was more volume of business, more sales and more outlets. They wanted distribution in the territory that we covered and they felt like that we could give it to them.

Q. With reference to Standard Motor Products, Incorporated, does Cotton States buy from them?

A. We do at this time.

Q. What year was that, 1949 and '50, do you recall?

A. I think so. You see, we originally were buying a line known as Hygrade Products and they sold out to Standard Motor Products and we continued to buy the items that we had been buying but we then were buying from the Hygrade Products Division of Standard Motor Products.

Q. Was that very much?

A. Not a great deal.

Q. Did an authorized representative of Standard Motor Products or Hygrade, the one you originally started with, did an authorized representative of Hygrade make similar representations to you that Moog and Niehoff and Whitaker did?

A. He did at that time. The Hygrade line was a good line. The items that they sold then were much better than they do today. They were selling repair kits for fuel pumps and things of that nature, speedometer cables.

Q. They did make similar representations to you?

A. That is right.

Q. What about NAMSCO?

A. Is that National?

Q. That is the one that this fellow Anderson—National Wheel.

A. Oh, yes, yes.

Q. That is the one Mr. Joe Anderson was the head of?

A. Yes, that is my recollection.

Q. And they made similar representations to you?

A. Yes.

• • •

Q. I am asking you now in your opinion whether you believed the price spread that was offered to Taylor Auto Parts in buying from Moog through the Cotton States could be cost-justified on the part of Moog.

• • •

A. Certainly I believe it was cost-justified.

Q. You believe it was?

A. Yes.

Q. That is your opinion?

A. Yes.

Q. May I ask you this, if your opinion wouldn't change if I told you that in the hearing yesterday that they put on a certified public accountant who I had examine the records of Moog and upon cross-examining and asking him if there was any possibility that Moog could cost-justify to any group merchandise, sales, cost-buying organizations his answer was no. Would that cause you to change your opinion in any way?

A. It wouldn't cause me to change my opinion, what the man told me. I told you in the beginning I hadn't seen the records. I don't know what it cost them to do business and I doubt if any auditor knows anything about merchandising. They don't know what it costs to get out and beat the bushes and sell that stuff.

Q. In other words, based on what I told you the testimony of the certified public accountant was, you still hold to your opinion that Moog Industries could cost-justify their sales to the group-buying organization, particularly the Cotton States Group?

A. Yes.

(R. 850-853, 859, 860-862, 877-878)

Witness Griener:

Q. How does the manufacturer benefit, if he does benefit from Cotton States?

A. He benefits in many ways. One of the most important ways I think he benefits is the fact that I don't believe any one jobber who is sitting down there in Podunk Town can get all these merchandising ideas and put them into effect sitting there by himself. Now I think the manufacturer benefits because we actually sit in these meetings and try to find out every possibly [sic] way we can to move his merchandise, to sell it, to get out on the market, and when we are up there exchanging those ideas, I think the manufacturer likes it. They just keep coming back all the time to sell us, to move their merchandise and you can look at their financial statements and they are making money, so they must like the way we are doing it.

Q. Then it is your testimony that Cotton States performs functions in connection with this merchandise that they buy which benefits the manufacturer and results in a savings to him in the cost of merchandising and selling his products?

A. Yes, we do, by other ways besides merchandising. I can give you a concrete example.

Q. Do, please.

A. When I run out say, for instance, I run out of a battery charger. Now, you know if I am sitting down there by myself I can't ring that fellow up down the street and say, "Joe, lend me a battery charger," but I can pick up the phone and call any one of our associates and, by swapping off that merchandise like that, I have made the sale where that manufacturer might have lost that sale.

Q. Have [manufacturers] led you to believe through their words and their actions that any discounts that were

given to Cotton States were justified to them in cost savings and manufacturing and selling?

A. Definitely.

Q. And did you believe it?

A. Yes, sir.

Q. Has there been anything that would lead you to believe otherwise?

A. Not a thing.

(R. 973-74, 977.)

See also testimony of Robinson (R. 246-48); Gates (R. 254, 953-63); Barbee (R. 279-280); Taylor [R. 763-69, 880-909 (listing 90 sellers who informed petitioners that their prices were cost-justified)]; Shipp (R. 926, 932, 941); Cotton (R. 996-98).

Witness Anderson:

A. Well, the advantage of doing that [selling groups] was self-evident, in our opinion, because we automatically acquired a lot of customers who were members of the Cotton States and we were assured of our money promptly; and, of course, the handling of that phase of the business became a lot more simple than selling to each individual, as it were, as there were in Cotton States.

Q. And was the general understanding [that prices were cost-justified] conveyed back and forth between you and the purchasers in general terms that it was so? I am not asking you for the terms of the accounting section; I know you can't recall them.

A. I would certainly say that was the train of thought as far as I was concerned.

(R. 719.)

Witness Goetz:

Q. Through this group your officer level can have one man attend once a year rather than having to send them around to all of the individual members; he can attend a group meeting and that results in a great service to you?

A. That is usually what is done and it does result in great savings to us.

Q. Not only money for his expenses, etc., but it is also a great saving in the time that the office is able to devote to other work for your company?

A. That is right.

(R. 725-726.)

(Goetz also testified that he considered Moog's prices justified in savings through advertising, commission, time saved by the officers of his corporation, cost of introducing new products "and such things as that generally" (R. 731)).

Witness Bushyhead:

Q. You stated that you considered the prices in the discounts and rebates that Moog gave to these respondents justified in cost savings. Would you state for the record some of the ways these respondents, Cotton States and Mid-South aid Moog and some of the savings it affords them?

A. Well, I think probably, as much as anything, in dollars and cents standpoint, would be the travel end of it. If you are talking about anywhere from ten to fifty customers, I don't think there is any question there is considerable saving in the fact you can reach them all at one time rather than have to go to each particular store and put your story over to them and tell them individually the same things you could tell them together. We work with the group manager. For example, in many cases he would travel with one of our men to help our man actually put the Moog story over. He's supposed to learn it, too, almost like we are. He assists us in making sales.

Of course, we don't have the credit problems. That is another important thing as far as we are concerned. Our customer, who would be Cotton States or Mid-South, are the ones that pays us and carries the credit and that can become a considerable cost, particularly if somebody doesn't pay you or refuses to pay you.

We disseminate information through them through bulletins,.through personal contacts and meeting them all together.

It would be hard for me to put an actual dollar value on it, but I think that the exchange of ideas at a meeting, there is no telling how much that would be worth to us where one jobber doesn't do so well on our line and another jobber does a very good job on our line, and the fact they can get together and talk about those things sometimes has a tremendous influence, in my opinion, on the other man buying the line from them. They exchange obsolescence in many cases.

Obsolescence is a big problem of any jobber. It is common knowledge. And through their association together, I think many of our obsolescence problems are minimized through exchange of obsolescence, and sometimes fast moving merchandise which they have too much of. Those are the types of things that I feel have considerable cost justification to them.

(R. 1126-1127.)

SUPREME COURT, U. S.
MOTION FILED
Office-Supreme Court, U.S.
FILED
JUN 20 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 114

MID-SOUTH DISTRIBUTORS, ET AL., COTTON STATES, INC., ET AL., *Petitioners,*

v.

FEDERAL TRADE COMMISSION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE ON BEHALF OF THE SOUTHWEST AUTOMOTIVE DISTRIBUTORS, INC., ET AL.

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